ATTORNEY FOR APPELLANT:

MICHAEL E. CAUDILL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

TOBY GILL
Marion County Dept. of Child Services
Indianapolis, Indiana

Guardian Ad Litem:

CYNTHIA DEAN
Child Advocates, Inc.
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE INVOLUNTARY TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF I.B. and I.D., Minor Children, and LAKEISHA DILLARD, Mother and MICHAEL BROWN, Alleged Father of I.B., and DELANEY WRIGHT, Alleged Father of I.D.,	)	
LAKEISHA DILLARD,	)	
Appellant-Respondent,	)	
vs.	)	No. 49A04-0603-JV-143
MARION COUNTY DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner, and	)	
CHILD ADVOCATES, INC.,	)	
Appellee-Guardian Ad Litem.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Charles Deiter, Judge
Cause No. 49D08-0306-JT-740

January 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Lakeisha Dillard appeals the termination of her parental rights to I.B. and I.D. She raises three issues, which we reorder and restate as:

1. Whether the process leading to I.D.'s removal from Dillard's care violated our federal and state constitutions;

2. Whether the court abused its discretion in admitting evidence; and

3. Whether the evidence supports the termination of Dillard's rights.

Because Dillard did not allege prior to this appeal that the process leading to I.D. being declared a Child in Need of Services ("CHINS") was unconstitutional, she has waived such argument on appeal. Any error in the admission of the challenged evidence was harmless. Because the evidence supports the termination of Dillard's rights, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 15, 2002, Indianapolis Police Officer Erroll Malone was called to the house where Dillard resided with her cousin. Dillard was sitting on the porch holding her son, I.B., and she was crying. Dillard wanted to go to court to support her boyfriend, but her cousin was refusing to care for I.B. Dillard told Officer Malone she was "going down the street to find someone to give her baby to." (Tr. at 18.) Because of that comment and

the difficulty Dillard was having holding I.B., Officer Malone called Marion County Child Protective Services ("CPS").

I.B. was removed from Dillard's care that evening. Three days later, the Marion County Department of Child Services ("DCS") filed a petition alleging I.B. was a CHINS because:

> The child's mother and sole, [sic] legal custodian, Lakiesha Dillard, has been endangering her child by her irrational behavior. Ms. Dillard does have a disability for which she receives SSI payments. Mother acted as if she would hurt the child (age one-month) or give the child away to a stranger on the street. Mother admits she needs help caring for the child. Mother is currently homeless and is in a shelter.

(Ex. at 2.) The court found probable cause at the initial hearing to support that petition. On October 15, 2002, the court accepted the parties' agreed entry, in which Dillard agreed I.B. was a CHINS and that made I.B. a ward of the State; placed him with Dillard's great-aunt Dorothy Davis; and ordered services for Dillard. (*See id*. at 19-25.)

In November of 2002, Dillard underwent a psychological evaluation, which determined she suffered from dysthymic disorder[1] and would benefit from medication. However, Dillard refused treatment and continues to refuse to take medication or receive mental health counseling.

On April 28, 2003, the DCS filed a petition to terminate Dillard's rights to I.B. because Dillard's "behaviors did not change; they were erratic in addition to that home based counseling was having some major concerns with her parenting abilities." (Tr. at 176.) In addition, Dillard was not benefiting from home-based services and was refusing

[1] Dysthymia is a "mood disorder characterized by chronic mild depression." The American Heritage Science Dictionary *available at* http://dictionary.reference.com/browse/dysthymia (last accessed December 18, 2006).

to follow the psychologist's recommendations.

After the petition was filed, Dillard became less willing to cooperate with services. In July and August, she missed a number of visitations with I.B. On February 28, 2004, Dillard signed consents for I.B. to be adopted by Davis, in whose care he had been while a ward of the State.[2]

On April 4, 2004, Dillard gave birth to I.D. Soon after she took I.D. home from the hospital, Dillard's mother convinced Dillard to take I.D. to stay with Dillard's aunt, Shirley Bluett. DCS received a phone call that I.D. was with Bluett. DCS took custody of I.D. and, on May 7, 2004, filed a petition alleging I.D. was a CHINS. (Ex. at 26-28.) The court held a hearing that day, found probable cause to support the allegation, made I.D. a ward of the State, removed him from Bluett's care, and placed him in foster care. (*Id.* at 29-32.)

After a fact-finding hearing on September 13, 2004, the court found I.D. was a CHINS and ordered supervised visitation for Dillard. (*Id.* at 41-42.) At a disposition hearing on November 16, 2004, the court entered a participation decree setting out the behaviors expected of and services to be completed by Dillard.

In December 2004, I.B. was removed from Davis' care after it was determined she had been abusing I.B. Because Dillard had consented to adoption by only Davis, the consent she had given for adoption, and thereby her consent to the termination of her parental rights, became invalid. The DCS reinstated the petition to terminate Dillard's parental rights to I.B.

On July 27, 2005, the DCS moved to add I.D. to the pending petition to terminate

[2] I.B.'s father consented to the termination of his rights so that I.B. could be adopted.

Dillard's rights to I.B. Following a hearing on October 21, 2005, the court entered an order including the following:

> MCDCS submits reports and attachments and report [sic] that [Dillard] is not compliant with services and homebased counselor is fearful of her life as to [Dillard]. [Dillard] reports she will not take medication as she had a[n] adverse reaction to medication. . . . GAL, visitation agency, homebased counselor and MCDCS are all in agreement for reduced visitation to one hour per week as to Mother and the Court Grants same.

(*Id.* at 52.) Then, on November 14, 2005, the court decreased Dillard's visitation with I.D. to one time per month. (*Id.* at 55.)

After fact-finding hearings on January 26, 2006, and February 8, 2006, the court entered an order terminating Dillard's parental rights to I.B. and I.D. The court did not enter specific findings; however, the court's conclusions included "a reasonable probability that the conditions that resulted in the children's removal will not be remedied;" "a reasonable probability that the reasons for placement of the children outside the home of the parents will not be remedied;" "continuation of the parent-child relationship poses a threat to the well being of the children;" and "[t]ermination is in the best interests of the children." (App. at 9-10.)

DISCUSSION AND DECISION

The Fourteenth Amendment to the United States Constitution gives parents a right to establish a home and raise their children. *In re D.G.*, 702 N.E.2d 777, 780 (Ind. Ct. App. 1998). However, a parent's right to her children is balanced against the State's limited authority to interfere for the protection of the children. *Id.*

1. Constitutional Argument

Dillard asserts the DCS has a policy to automatically remove subsequently born children from any parent who already has a child that is a ward of the DCS. She claims such a policy violates her federal and state constitutional rights to raise her children.

Dillard's argument challenges the constitutionality of the process by which I.D. was declared a CHINS. Such arguments should be made during the CHINS proceedings and in an appeal therefrom. However, they must be made in the termination proceedings. *McBride v. Monroe County Office of Family & Children*, 798 N.E.2d 185, 195 n.4 (Ind. Ct. App. 2003) ("To preserve her constitutional claim for appeal, McBride could and should have raised her due process argument during the termination proceedings."). Dillard's attempt to raise this argument on appeal following the termination of her parental rights is untimely and, thus, has been waived. *See id.* at 195.

Waiver notwithstanding, we disagree with Dillard's characterization of the testimony on which her argument is based. Dillard quotes the following testimony of Sharon Profeta, a family case manager from the DCS:

> Q: Is that typical policy of your Department of Child Services to basically "flag" any subsequent children that are born to parents of children who are already a Ward of the State?
> A: Yes.
> Q: And is it typical for, is it Department of Child Services to file a CHINS based solely upon a subsequent birth and the prior wardship of the previous child?
> A: Yes.
> Q: In this case?
> A: Yes.
> Q: So basically it was the intent of the Department of Child Services to file the CHINS Petition as soon as [I.D.] was born is that correct?
> A: Yes.

(Tr. at 208-09.) In response, the State cites a portion of Profeta's testimony that Dillard omitted:

> A: Well what happens is if we have a mother who has children who are in our care that are also Wards not in her care, not in her custody, when there's a birth like an after born; we usually send a letter to the Social Worker at the hospital where she is going to give birth stating that we need to be notified when the baby is born.
> Q: And why is that?
> A: Because if we have a mother who has a child that is a Ward and we're saying that she cannot take care of that child then we have to look and see if she's able to take care of the new baby. So chances are we'll be removing the after born also.

(*Id.* at 208.) As explained in Profeta's last two answers, the DCS does not have a policy of "automatic" removal of children whose parents already have one child who is a ward of the State. Rather, the DCS has a policy of remaining knowledgeable about pregnancies in women who already have a child or children who are wards of the State, so the DCS can "look and see if she's able to take care of the new baby" when it is born. (*Id.*) Dillard has not demonstrated the DCS procedure "does not take into account the particular circumstances of the parent and child at the time." (Appellant's Br. at 13.) Accordingly, her argument fails.[3]

2. Admission of Evidence

Dillard asserts the court abused its discretion when it admitted "potential impeachment evidence" when the witness to be impeached had not yet testified and, ultimately, never did testify. The admission or exclusion of evidence is left to the discretion of the trial court, and we may reverse only for an abuse of that discretion. *In re A.H.*, 832 N.E.2d 563, 567 (Ind. Ct. App. 2005). An abuse of discretion occurs when the

[3] Because Dillard did not demonstrate the DCS has a policy of "automatic removal," we need not determine whether such a policy would violate a parent's constitutional right to raise his or her children.

decision was against the logic and effect of the facts and circumstances before the court. *Id.*

When Lonya Thompson, a home-based therapist, was on the stand, the State asked her whether Dillard's mother, Patricia Bannion, ever talked to Thompson directly about Dillard's ability to parent I.D. alone. As Thompson began to answer the question, Dillard objected because Thompson's response would be hearsay. The State argued:

> Yeah, sure. Judge, yeah I did speak a little bit with [Dillard's counsel] about this. I would ask that the Court would introduce as potential impeachment evidence. We anticipate his, this witness [Patricia Bannion, Dillard's mother] testifying that [Dillard]'s a good parent and she's able, she should be able to appropriate, she should appropriately parent these children. So this is really going to be conditionally relevant upon [Dillard's counsel] calling [Bannion], but in the Court's interest of time and judicial economy I would like to be able to ask each of the next, these first four witnesses about conversations they may have had with [Bannion] about her statements as to [Dillard]'s ability to parent. So it goes to impeachment and not hearsay and it will become relevant after [Bannion] takes the stand.

(Tr. at 54.) The court determined "those questions about . . . Patricia Bannion opinions about Ms. Dillard. Okay, so we'll allow them to be asked and answered *but not for the truth of any the* [sic] *assertions, just for the fact that she's expressed those opinions*. So go ahead." (*Id*. at 54-55) (emphasis added). Thompson then testified:

> [Bannion] felt like [Dillard] could not take care [of] [I.D.] alone. She didn't feel like she was capable of even being there for [I.D.] because according to her Mom, when [Dillard] gets her mind set she'll just up and leave and she didn't feel like [Dillard] feel like [Dillard] [sic] would stay there for [I.D.].

(*Id*. at 55.)

The trial court understood the statements were being offered as potential impeachment testimony for a possible defense witness. The court admitted the

statements only as impeachment evidence and "not for the truth" of what was said. (*Id*.) While we may have had concern about improper influence if this evidence had been presented to a jury, we presume the court is capable of following its own evidentiary rulings. *See Shanks v. State*, 640 N.E.2d 734, 736 (Ind. Ct. App. 1994) (In trial without a jury, "it may be presumed that the judge will disregard inadmissible and irrelevant evidence in determining" guilt or innocence; thus the harm "arising from evidentiary error is lessened if not totally annulled when the trial is by the court sitting without a jury.") (internal citation and quotations omitted). Thus we presume the court did not consider that hearsay statement when it determined whether the evidence was sufficient to support the termination of Dillard's rights.[4]

Finally, in light of the weight of the evidence supporting termination of Dillard's rights, even if error had occurred, Dillard would not have been able to demonstrate her substantial rights had been prejudiced. *See* Ind. Appellate Rule 66(A) ("No error or defect in any ruling or order . . . is ground for granting relief or reversal on appeal where

---

[4] Dillard asserts the same error occurred during the testimony of Desiree Tilton, a home-based case manager with St. Vincent New Hope, who took the stand as a State's witness. At the end of her testimony, the following dialogue occurred:

> [Court]: Any redirect?
> [State]: I have just a couple of questions related to the potential impeachment evidence, Judge, if I could.
> [Court]: Okay, so you're going to ask questions about statements made, what was that lady's name again?
> [State]: Patricia Bannion.
> [Court]: By Patricia Bannion and you want to ask them solely to show what she uttered and not for the truth of it, like we did with the previous witness?
> [State]: Yes Judge. And it will only become relevant once she testifies.
> [Court]: Okay.
> [Dillard]: And Judge, just show my objection for any reason it's used for the truth of the matter for the limited purposes of impeachment and not then I have no objection.
> [Court]: Okay, over Ms. Dillard's objection I'll allow such questions; go ahead.

(Tr. at 83-84.) However, Tilton testified Bannion had not made any statements to her about Dillard's parenting abilities. Accordingly, no allegedly prejudicial hearsay was admitted during Tilton's testimony.

its probable impact in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.").

3. Sufficiency of Evidence

When a parent appeals the termination of her parental rights, we will not reverse the trial court's judgment unless is it clearly erroneous. *M.H.C. v. Hill*, 750 N.E.2d 872, 875 (Ind. Ct. App. 2001). When determining whether the evidence supports the findings and judgment, we may not reweigh the evidence or reassess the credibility of the witnesses. *Id*. We will set aside the trial court's findings only if they are clearly erroneous; that is, if the record lacks any evidence or reasonable inferences to support them. *Id.* We consider only the evidence and reasonable inferences therefrom that support the judgment. *In re D.G.*, 702 N.E.2d at 780.

A trial court may not terminate a parent's rights unless the State demonstrates by clear and convincing evidence "there is a reasonable probability that: (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child."[5] Ind. Code § 31-35-2-4(b); *see also In re W.B.*, 772 N.E.2d 522, 529 (Ind. Ct. App. 2002) (noting State's burden of proof).

To determine whether a reasonable probability exists that the conditions justifying a child's continued placement outside the home will not be remedied, "the trial court

[5] The court concluded the evidence supported all three of those conclusions. Nevertheless, because the statute is written in the alternative, the State needed to prove only one. Therefore, when we find the evidence supports one of the trial court's conclusions, we need not determine whether the evidence supports the remaining portions of the statute. *See In re J.W.*, 779 N.E.2d 954, 962 (Ind. Ct. App. 2002) (because Ind. Code § 31-35-2-4(b)(2)(B) is written in the alternative, we need not address evidence supporting threat to child because evidence supported finding reasons for removal would not be remedied), *trans. denied sub nom. Weldishofer v. Dearborn County Div. of Family & Children*, 792 N.E.2d 40 (Ind. 2003).

must judge a parent's fitness to care for her children at the time of the termination and take into consideration evidence of changed conditions." *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied sub nom. Timm v. Office of Family & Children*, 753 N.E.2d 12 (Ind. 2001). Nevertheless, the trial court must also "evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." *Id.* The court may consider the parent's response to services offered by an Office of Family and Children when determining whether conditions have changed. *See M.B. v. Delaware County. Dept. of Welfare*, 570 N.E.2d 78, 82 (Ind. Ct. App. 1991).

Officer Malone testified he had, in his capacity as a police officer, seen Dillard "three or four times," (Tr. at 17), prior to July 15, 2002, and "[a]pproximately twenty to thirty" times between July 15, 2002, and the hearing on January 26, 2006. *Id.* Because he works from 9:30 in the evening to 6:00 in the morning, those are the times he has seen her. "Typically she's been angry or upset." (*Id*. at 22.) Eighty percent of their contacts were because she contacted police to report, for example, people had knocked on her door, things were missing from her apartment, or her neighbors were too loud. None of the calls to which Officer Malone responded were crimes against Dillard, but he was aware of at least two times other officers had responded to calls reporting Dillard had been physically assaulted.

In November 2002, Dillard underwent a psychological examination that determined she had dysthymic disorder. It was suggested she be evaluated for medication. Her caseworkers encouraged Dillard to be evaluated for medication and explained to her that medication could "help her possibly cope better with stressful

situations and to alleviate some of her symptoms of depression." (*Id*. at 43.) Thompson thought medication might help Dillard control "[s]ome of her emotional outbursts that she would have during sessions with her child present," (*id*.), and believed Dillard "was probably not going to be able to be a successful parent if she didn't learn to control some of the behaviors that she exhibited." (*Id.* at 44.) When asked to explain, Thompson stated:

> [Dillard] often during sessions and during visits with her son she would have these emotional outbursts where she would just walk away and start crying and whatever was going on, like if she were in a visit with her son, she would just drop everything. She would just leave him there on the floor and just walk away, start crying, yelling screaming with her Aunt or screaming with whoever was there. She had a really difficult time coping with her feelings, containing her emotions.

(*Id*. at 45-6.) Because of these concerns, Thompson continued to encourage Dillard to be evaluated for medications, but Dillard always refused.

When Dillard was referred to St. Vincent New Hope again in September 2004, she displayed many of the emotional problems she had been experiencing earlier:

> Well, in going into our therapy session you never knew what was going to happen. She could be very -- -- [Dillard] could open the door and be very pleasant and that would usually be a good day, or she could open the door or not open the door all and just completely go off on me or other staff members. She would get angry for no apparent reason, I mean, I had no idea why she was getting angry at some times towards me or other situations. She was very angry and acted threatening, I mean, I felt threatened at some points in time. And she was just very emotionally unstable. Sometimes during therapy sessions we'd just be talking and she would just start crying for no apparent reason. So I found that to be very concerning. And I mean, everyday, it was very inconsistent, we just never knew what was going to happen when we went in for a visit or a supervised or a therapy session or a supervised visit. Or when we were going to do other things to help her.

(*Id*. at 94-95.)

On several occasions between October 2004 and October 2005, Melissa Eisele, Dillard's home-based therapist at St. Vincent New Hope, had to assess Dillard for suicide because of the things Dillard was saying. Eisele also suggested Dillard obtain psychiatric assistance:

> I really felt that she needed that to, you know, have a good stable life, I mean just it just seemed like she was always so up and down with everything and I just really thought that that would be one thing that could really help her. Getting some therapy with a psychiatrist and you know, maybe taking some prescribed medications. I don't know what they would diagnosis [sic] her with but you know she had been very delusional when we worked with her and then the anger and the inability to control her anger it was very concerning.

(*Id*. at 97.) However, Dillard again refused to obtain any such assistance. Because of Dillard's emotional swings, Eisele was never able to suggest unsupervised visits for Dillard.

Neither did Officer Malone feel it would be safe to leave a child with Dillard because "she doesn't focus on what she's doing and I feel that emotionally she gets frustrated and angry at things that are going on around her and I don't know that she has the patience for it." (*Id*. at 25.) Case manager Desiree Tilton did not believe it would be safe to return I.B. to Dillard because:

> her mood would vacillate, you know, sometimes she would be excellent, a very good parent and then something would happen and she would -- -- her brain would kind [of] focus on the other instance and not on what she was suppose [sic] to be doing. And then there were the occasions where she herself were [sic] victimized by, you know, people that would come to her apartment and if there was a child there during those times I would fear for that child's safety as well.

(*Id*. at 79.)

Dillard testified she did not think any of her caseworkers had wanted to help her

get I.B. back. Instead, she believed "they was telling a whole bunch of lies and just going on with (unintelligible) and therefore I mean just putting it on me . . . , but they was a whole bunch of lies saying that I'm not capable of taking care of a kid." (*Id*. at 255-56.) She also testified that, while she believed Officer Malone was there to help her, she did not ever tell him she was going to give her child to someone else.

Dillard testified she had been raped four times and robbed seven times between July 2002 and February 8, 2006. Caseworkers explained many of these events happened because Dillard did not understand the dangerousness of the situations in which she placed herself. For example, Thompson explained:

> Well, [Dillard] often had relationships with several different men where she put herself in danger allowing these individuals to come over to her house during the time period that she was [living] on Tacoma [Street], several instances happened where she would meet a guy; she met one guy named, one guy named Chris that she knew for a couple weeks. She invited him to her house and he ended up robbing her and taking all of her money.
>
> She had another guy by the name of Craig, Greg, I should say, who she had only known for a little while. She met him at the bus stop; she invited him back to her house. They ended up having a falling out; he ended up cutting her phone lines.
>
> And then there was another friend of hers [sic] named Bone, who at one point she was dating this individual. Things didn't work out; she reported that he was abusive and that he seemed to [be] using her. He ended up coming back into her life after she had broken up with him at one point. He ended up coming back into her life in May of '02, '03, I'm sorry and ended up stealing her I.D. and her bus pass.

(*Id*. at 50.)

Dillard claimed she had family support to help her with her children. However, none of her relatives came to the final hearing. She said they were "probably all at home and asleep." (*Id*. at 260.) Even her mother, Bannion, who was scheduled to testify as a

witness for Dillard, did not come to the hearing. Thompson testified Dillard's "family wasn't very supportive" during 2002 and 2003. (*Id*. at 52.) During the time Dillard stayed with her mother in October 2002, Dillard reported her mother would not take Dillard to appointments or assist her with applying for food stamps or Medicaid. When Dillard again was working with St. Vincent New Hope in 2004 and 2005, caseworkers did not believe she had much family support.

The evidence supports the court's conclusion the circumstances resulting in the children's removal had not been, and would not be, remedied. Accordingly, the trial court did not abuse its discretion when it found the evidence supports termination of Dillard's parental rights.

CONCLUSION

Dillard waived any challenge to the procedures by which I.D. was declared a CHINS. Dillard has not demonstrated she was prejudiced by the court's admission of potential impeachment evidence related to possible testimony by Dillard's mother, Bannion. The evidence was sufficient to support the termination of Dillard's rights and, therefore, we affirm.

Affirmed.

BAILEY, J. and RILEY, J. concur.